NO. 216

In the Supreme Court of the United States

OCTOBER TERM, 1941.

A. W. STICKLE & COMPANY, a Corporation,
Petitioner,

VERSUS

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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To the Honorable Supreme Court of the United States:

Though we are keenly aware of the careful consideration given by the Court to each petition for certiorari and the tremendous burden of work upon the Court, we feel justified in filing this petition for rehearing for two reasons:

First: The effect of the decisions of the Courts below will be to throw an enormous additional burden upon the carriers for hire of the Nation, which are already struggling to take care of shipments, both governmental and private, beyond their capacity.

Second: We feel that we must not have given the Court a clear picture and understanding of the controversy in our petition for certiorari and supporting brief and of the importance of its determination by this Court, in view of the fact that the Court denied certiorari notwithstanding that the Circuit Court decision was by a divided court and the Solicitor General and counsel for the Interstate Commerce Commission, the appellee, in their memorandum in response to the petition for certiorari confessed partial error of the Circuit Court and in addition agreed that Paragraphs 1 and 3 of the reasons relied on for allowance of the writ in our petition were well taken. The first of these reasons reads:

> "(1) The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. This is a case of first impression, being the first case involving a construction of the definitions of the three types of motor carriers classified in Part II of the Interstate Commerce Act."

The third reason reads:

> "(3) The questions presented are of great public importance because they involve the most vital feature of the Act, namely, the definitions of the classes of carriers to whom the Act applies, and the consequent regulations and provisions of the Act with which a particular individual must comply. Of special importance is the fixing of the line of demarcation between those falling into the classes of carriers for hire, with the stringent regulations justified through their character as public utilities, and those who fall into the class of private carriers, with the privilege of operating as a matter of right and subject only to slight

regulations primarily in the interest of public safety. Constitutional rights are concerned, because if the definitions contained in the Act have the effect of converting by legislative fiat the operations of one who is a private carrier into those of a carrier for hire, such would amount to the deprivation of property without due process of law."

We feel that it will be helpful to embellish the very brief statement of facts and the method of appellant's operations outlined in our petition for certiorari. In doing so, we wish to point out that the facts are undisputed, since the only evidence introduced by appellee was by stipulation (R. 59, 85).

In virtue of the facts being uncontroverted, we feel free to quote the following description of appellant's operations in the dissenting opinion of Circuit Judge Huxman, and do so because it is a succinct and clear description (R. 165), 128 Fed. (2d) 155, at 161:

"But what are the facts? Stickle was formerly in the wholesale and retail lumber business. Jackson was engaged in the retail lumber business, and also worked as a lumber salesman. They incorporated the appellant company. Its charter authorized it to buy and sell lumber at wholesale or retail or on a commission basis. It further authorized it to buy and sell at wholesale or retail other allied products, such as brick, paint, timber, and other products. Appellant solicits orders for lumber. It purchases its lumber from mills on the open market, buying wherever it gets the best prices, and paying its own money therefor. Most of the lumber is purchased to fill orders previously secured. The percentage of lumber so purchased varies from forty to eighty-five per cent of the total lumber bought, de-

pending on the condition of the market. Appellant also maintains a lumber yard in Oklahoma City where some lumber is stored and from which place deliveries are made, although at times there is no lumber stored in this yard. Appellant quoted its customers two prices, an f. o. b. price and a delivery price. The f. o. b. price included the cost of lumber to appellant, plus an added commission. The delivery price consisted of the f. o. b. price, plus the transportation charges. At first all deliveries were made by common carrier. After appellant had been doing business for about a year, it purchased trucks, and thereafter made deliveries of lumber mostly in its own trucks, although from ten to thirty per cent is still delivered by common carrier. It bought, paid for, and owned all the lumber it handled, whether sold f. o. b. or delivered. It did not haul for hire or transport property other than its own."

It must be plain that the effect of the decision of the Circuit Court that the appellant is a contract carrier (which appellee confesses is error) or the decision of the Trial Court that the appellant is a common carrier will be to compel appellant to wholly abandon its lumber business and force it into the business of a carrier for hire. This must be true, because as a common carrier appellant could charge and receive only the rates provided for in tariffs on file with the Interstate Commerce Commission under the provisions of Part II of the Interstate Commerce Act, and would not be permitted to make any profit on the spread between the purchase price of the lumber at the mill and the selling price at the point of destination, or to take chances on a rising or falling market to profit or lose.

The same thing is so if appellant is held to be a contract carrier. In the first place, it could not contract with itself and could not file written contracts with the Interstate Commerce Commission as required by law. In the second place, it would have to comply with minimum rates which must be filed with the Interstate Commerce Commission. Finally, it would be so impractical that it would be impossible to carry on the business because appellant is dealing with several hundred lumber dealers and seeking new customers each day, just like any other merchant, and the personnel of its customers changes from day to day.

The only alternative offered appellant, other than quitting the lumber business entirely and going wholly into the business of a common carrier for hire, would be to cease transporting its own lumber in its own trucks altogether, and to ship entirely by carriers for hire (it now ships from ten to thirty percent, R. 61).

We wish to be a little more explicit upon and emphasize this point because the effect on this appellant of the decisions below will be multiplied time and again upon hundreds of private carriers similarly situated.

The appellant is determined by the Circuit Court to be a contract carrier and required to cease operating its trucks in the transportation of its lumber until compliance with the provisions of the Federal Motor Carrier Act.

To do this, appellant must:

(a) File with the Interstate Commerce Commission a schedule of minimum rates (49 U. S. C. A. 318).

(b) Enter into a bilateral contract to transport lumber from a certain mill to the dealer to whom it has sold a load of lumber (49 U. S. C. A. 318, 320; *Ex parte* No. MC-12, 1 M. C. C. 628, Contracts of Contract Carriers).

(c) File with the Commission a copy of each contract (49 U. S. C. A. 320 (a); *Ex parte* No. MC-9, 2 M. C. C. 55, Filing of Contracts).

(d) Not receive any more than the price for which it purchases the lumber from the mill plus the transportation rate (49 U. S. C. A. 318 (a)).

Pursuant to the authority granted the Commission by the Act, the Commission made a report and order in *Ex parte* No. MC-12, Contracts of Contract Carriers, in April, 1937, requiring as a prerequisite to operations by contract carriers:

> "All contract carriers of property by motor vehicle, as defined in Section 203(a)(15) of the act, shall transport under contracts or agreements which shall be in writing, which shall provide for transportation for a particular shipper or shippers, which shall be bilateral and impose specific obligations upon both carrier and shipper or shippers, which shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which shall be preserved by the carriers parties thereto so long as the contracts or agreements are in force and for at least one year thereafter."

In addition, these contracts must be filed with the Commission.

Of course, it is impossible to do these things and remain in the wholesale lumber business. The appellant does busi-

ness with scores of retail lumber dealers, and tries to do business with more. In other words, like any mercantile concern, it tries to sell lumber to every dealer it can in the states and territories where it does business. Of course, it could not file a contract for each shipment with the Commission.

Furthermore, since appellant is transporting its own lumber, it could not make a contract for the transportation thereof, because it could not contract with itself.

Still more significant is the fact that it could not buy the lumber from the mills at one price and sell it at a higher price to its customers. It could only charge the retail dealer what it actually paid the mill for the lumber, plus the transportation charge of the rate on file with the Commission. The statute (49 U. S. C. A. 318(a)) makes it illegal to do otherwise.

It can hardly be gainsaid that appellant would be forced out of the lumber business and could only operate as a contract carrier for hire, hauling lumber for such other people as it could get to haul. That is, it could solicit wholesale lumber dealers for their lumber to haul, or the mills if they were selling direct to retail dealers.

The situation would be just as bad under the conclusion of the trial court that appellant is a common carrier for hire, and requiring it to comply with the Act in that respect which provides for the filing of a tariff setting forth the rates to be charged (49 U. S. C. A. 317). Appellant could receive no more and no less than is provided for in such filed rates. It could not make anything from the purchase

and sale of the lumber, as it does not. Also, it would have to haul lumber for the general public whenever requested; it could not select its customers.

A consideration of these things in the light of the record demonstrates that the business as conducted by appellant is neither that of a contract carrier, as held by the Circuit Court, nor that of a common carrier, as held by the lower court.

There is no decision cited in the opinion below and no decision of the Interstate Commerce Commission that we have been able to find that holds that merely because an individual includes in the sale price of the goods which he transports a charge for transportation commensurate with the distance, makes him a carrier for hire. And, in the absence thereof, the Court should resolve every doubt against such a construction of the Act because of its serious effect upon the business of a large number of business enterprises.

It means that no dealer in a bulky product like lumber, coal and similar so-called low-value goods can transport his own goods as a private carrier. He will be forced to use carriers for hire and will be deprived of the benefit of the advantages of having his own transportation as an integral part of his business.This is because transportation represents a large portion of the value of such goods, and it is impossible to compete unless natural geographical advantages of localities are reflected in the sale price.

A simple illustration will suffice. Suppose it cost $5.00 to transport a $50.00 load of lumber to Muskogee, Oklahoma, making the sale price to the dealer there $55.00. As-

sume that Muskogee is approximately one hundred miles from the mill.

Then assume that it would cost $12.50 to transport the same load to Oklahoma City which is two and one-half times as far from the mill as Muskogee, making the sale price in Oklahoma City $62.50.

If appellant had purchased the lumber from the mill for $45.00, manifestly it could not deliver it in Oklahoma City for the same price as it delivered it in Muskogee.

The effect of the Court's holding is that for appellant to be a private carrier, it must charge the same sale price (that is, the same charge for transportation must be included therein) on the same type of lumber in every town, regardless of distance. Of course, competitive conditions make this impossible.

Furthermore, communities are entitled to the advantages of their geographical locations, as has been recognized by the Federal Courts and the Interstate Commerce Commission for many years. *Board of Trade of Kansas* v. *United States*, 36 F. S. 865 (affirmed January 5, 1942, 86 L. ed. 331).

In its final analysis, the import of the Circuit Court's decision is that if appellant sold only to lumber dealers in one town, so that the transportation charge included in the sale price was the same to all its customers, then it would be a private carrier—even though appellant's operations were otherwise conducted exactly as they are now. But, because appellant does business in widely separated towns,

it becomes a carrier for hire because it receives "compensation" for the transportation commensurate with the distance and expense thereof.

The construction of the Court of the definitions of the Motor Carrier Act deprives appellant and others similarly situated of their rights without due process of law, in that they are forced into the business of a carrier for hire or are prevented from hauling their own goods as a private carrier. They are relegated to one alternative or the other.

The fact that the Court or Congress itself desire to protect and benefit common carriers, it could not do so by this means under the constitutional mandate, as the Supreme Court of the United States squarely held in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101.

The real vice of the decision of the Circuit Court is that it sets up another standard, different from that which Congress has given us, by which to determine whether a motor carrier is a private carrier or a contract or common carrier.

The court below held that the primary test to be applied in determining whether an individual is a private carrier or not is whether the transportation is "for compensation," using this language:

> "The primary test in Sections 203(a) (14) and 203 (a)(15) is transportation 'for compensation.' "

In other words, the Circuit Court holds that if the individual receives "compensation" for the transportation of the goods which he owns, then he is conclusively not a private carrier.

This broad type of test forecloses a merchant who transports his own goods in his own equipment from including a charge in the sale price to cover the expense of transportation. Down to its ultimate possibilities of construction, this test would prevent there being any such thing as a private carrier except within urban limits.

The court below especially holds that where the owner of goods charges a different selling price at one point than it does at another, due to a different expense in transportation cost, definitely takes him out of the category of a private carrier under the statutory definition.

This is wrong. To quote from an eminent authority on transportation matters and Interstate Commerce Commission litigation:

> "It is doubted whether there is any instance where the Commission has found to be common or contract carriage any transportation in connection with which the person doing the trucking was the ultimate, actual owner of the goods, either as consignor or consignee and whose primary income was the purchase or sale of the particular goods, and not the transportation as such. Where the Commission found the transportation of goods owned by the carrier to be common or contract carriage, the Commission clearly showed that the trucker made his profit from, and was actually engaged in, the transportation business so far as the particular commodities were concerned.
>
> "As an illustration of actual ownership of the commodity transported, in *Murphy Common Carrier Application*, 21 M. C. C. 54, the Commission said:
>
> " 'Applicant, since before June 1, 1935, has been engaged in operating a coalyard, a chicken-coop factory,

and a sawmill and lumber business at Crutchfield, Ky. During this time he has sold and transported by motor vehicle a large portion of the lumber output of his mill to dealers at Cairo, Ill., and has received compensation therefor on the basis of a flat price at the mill *plus an amount for transportation based on the carload rail freight rate from Crutchfield to Cairo.* Likewise, he has sold and transported chicken coops to dealers at points in Missouri, Illinois, and Tennessee, and at other points in Kentucky, for which he has been compensated on the basis of a flat price at the factory plus an amount for handling and transportation. Frequently on return trips applicant has purchased coal at points in Illinois, which he has transported to Crutchfield and either sold and delivered to customers immediately or unloaded at his coalyard for subsequent sale and delivery. In each instance the price of the coal to the customer in Kentucky included a definite amount for the various services performed by applicant, including an amount for transportation from the mines in Illinois.

" 'From the foregoing we are impressed that applicant's principal business is that of a dealer in lumber, chicken coops, and coal, and that the above-described motor-vehicle operations are merely incidental thereto and are not engaged in as separate and distinct undertakings. *The fact that a charge is added to the selling price of the products is not controlling and does not alter the essential nature of the operations.* We conclude that applicant, in respect of them, is a private carrier and that he does not require authority from us in order to continue them. Compare *Swanson Contract Carrier Application*, 12 M. C. C. 516.' " (Italics ours). Warren H. Wagner, Editor-in-Chief, I. C. C. Practitioners' Journal, in November, 1941 Issue, Vol. 9, No. 2.

It was stipulated that appellant was the owner of all the lumber it transported (R. 62). There was no subterfuge involved.

The decision of the Circuit Court is not in harmony with its own opinion in *Interstate Commerce Commission* v. *Clayton*, 127 Fed. (2d) 967, which is very similar to the instant case and involves a determination of the proper classification of a carrier under the Federal Motor Carrier Act.

Clayton transported coal to which he held the title, from the mine to the town of Ucon, Utah, where he lived, and several neighboring towns. As the Court found in the opinion, he solicited orders for coal, both before he transported it and afterward, though he did not purchase coal to fill any particular order.

Appellant here operates both ways, and makes sales of lumber before it purchases the same from the mill and also purchases lumber for which it has no prior sale. The amount varies widely as to whether the lumber market is steady or advancing or declining. This is stipulated to and undisputed (R. 62).

The Court pointed out in the Clayton case that Clayton charged a uniform price in the several towns, and:

> "He makes no differentiation in price between coal delivered at Ucon and at the other nearby towns, although delivery to the other towns entails a longer haul."

An examination of that case reveals that the towns are in the vicinity of five or six miles or just a short distance of each other.

The appellant here is serving towns hundreds of miles apart. Would Clayton not be a private carrier if he charged a higher price in some town that required one hundred miles more transportation?

The Circuit Court in the Clayton case said with reference to the sale price of the coal by Clayton:

> "The price of $8.50 is determined by competitive conditions. The coal costs him $3 per ton and the cost of transportation, including depreciation, gas, oil, tires, and repairs is approximately $2.55 per ton.
>
> * * * * * * * *
>
> "The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus, he *realizes a profit, both from the transportation and from the sale* of the coal, the margin of profit being enough to cover both." (Italics ours).

The appellant here is in stronger position because it is realizing no profit from the transportation, as the undisputed evidence shows. The profit was solely from the difference between the price paid for the lumber and the price for which it was sold.

A further comparison is helpful. The Court in the Clayton case said:

> "He does not hold himself out to the general public to haul coal for compensation."

There is nothing in the record to show that appellant here holds itself out to the general public to haul lumber for compensation. As a matter of fact, the Circuit Court evidently so felt because it summarily rejected the Trial Court's holding that it was a common carrier.

The Circuit Court also takes notice in the Clayton case that the price for which Clayton sold was "determined by competitive conditions." This is likewise true of the sale price of appellant of its lumber, as shown by the undisputed proof (R. 110-4).

There are six decisions of the Interstate Commerce Commission in the Clayton opinion in support of the conclusion that Clayton was a private carrier, namely:

D. L. Wartena, Inc., Common Carrier Application, 4 M. C. C. 23.

Gallup Mercantile Company Common Carrier Application, 14 M. C. C. 23.

Murphy Transfer Company Common Carrier Application, 9 M. C. C. 361.

Murphy Common Carrier Application, 21 M. C. C. 54.

Swanson Contract Carrier Application, 12 M. C. C. 516.

Spanhake Common Carrier Application, 21 M. C. C. 258.

We assert that each of these decisions is just as applicable and persuasive in favor of the classification of the operations of appellant herein as that of a private carrier as those of Clayton. In all of them, a transportation charge was made in the sale price, and the Commission expressly held that the individual was a private carrier, "notwithstanding the fact that its selling price includes freight charges."

A balancing and contrast of the operations of Clayton and appellant shows that there is no real and substantial difference between the two upon the fundamentals under consideration; that both purchase their product as cheaply

as possible—one coal and the other lumber—and sell it for as high a price as competitive conditions will permit, the sale price, of course, including the charge for transportation.

CONCLUSION

This is a case of first impression and a test case. The effect of the decision of the Circuit Court of Appeals upon the transportation of the Nation almost transcends conception, even by those who are experts in the transportation industry. The test that the word "compensation," as used in the Motor Carrier Act definitions, is equivalent to "for hire," as contended for by the appellee and as held by the Circuit Court of Appeals, has not been put into total and general force by the Interstate Commerce Commission in measuring the character and nature of the operations of the carriers of this country, and we assume that the reason therefor is that an expression from this Court has been awaited.

If this criterion is put into general action throughout the United States, it will mean that a large amount of gasoline, petroleum, petroleum products, coal, lumber and even various numbers of manufactured products that are hauled by the merchants who own them, in their own trucks, will be dumped upon the over-loaded public carriers, and will seriously affect the national economy. It will mean a widespread destruction of the property right of a person to haul his own goods without being subjected to the onerous requirements upon a carrier for hire.

We respectfully pray the Court to reconsider our petition for certiorari herein, and to assume jurisdiction of this cause and decide the same upon the merits.

Respectfully submitted,

JOHN B. DUDLEY,
DUKE DUVALL,
Counsel for Petitioner.

November, 1942.

CERTIFICATE.

I do hereby certify that the foregoing petition for rehearing is not filed for delay, but is filed in good faith, in the belief that it is meritorious.

DUKE DUVALL,
Attorney for Petitioner.